

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID TYREE LOCKETT,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2005

No. 249831

Wayne Circuit Court

LC No. 02-012639-01

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of first-degree murder, but was convicted of two counts of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of thirteen to twenty years' imprisonment for the assault convictions, to run consecutively to the mandatory two-year term for the felony-firearm conviction. Defendant appealed by right and was granted a remand to develop a claim of ineffective assistance of counsel. Following an evidentiary hearing, the trial court denied defendant's motion for a new trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his trial counsel's failure to interview all four potential alibi witnesses and to present them at trial to establish an alibi defense constituted ineffective assistance of counsel. Counsel indicated he spoke with two or three of the witnesses. Three of the four witnesses said that they spoke with defense counsel. Counsel explained that there were some problems with the alibi witnesses. While he did not elaborate, we note that all had the bias of girlfriend, brother or friend. Further, defendant's brother had the added problem of a larceny conviction, which could have been used to impeach his testimony. None of these individuals went to the police with information that potentially could have exonerated defendant. Moreover, the trial court found it suspect that three of the witnesses traveled from downtown Detroit all the way to Warren at 10:45 p.m. just so that one individual could borrow \$20 from defendant. Counsel stated that he had filed the notice of alibi defense as a precautionary measure, but decided against raising it because he did not want to shift the focus from inconsistencies in the prosecution's case to the credibility of the alibi witnesses. Counsel specifically noted the fact that casings from the shooting were found at a location different from where the victims claimed defendant was standing, as well as numerous inconsistencies in the victims' testimony. Also,

counsel described alibi defenses generally as “not an outstanding defense” since alibi witnesses in particular often get “tripped up” on why they recall that it was a specific day or a specific time, “and all of a sudden the jury can become hesitant about . . . whether or not they believe a witness is telling the truth.”

In reviewing a determination regarding ineffective assistance of counsel, factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004). “[T]o demonstrate ineffective assistance, a defendant must show that his attorney's performance fell below an objective standard of reasonableness. The defendant must overcome the presumption that the challenged action could have been sound trial strategy. . . . A reviewing court must not evaluate counsel's decisions with the benefit of hindsight. On the other hand, the court must ensure that counsel's actions provided the defendant with the modicum of representation that is his constitutional right in a criminal prosecution.” *Id.* at 485, citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), and *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

“Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, *supra* at 690-691.

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A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make “an independent examination of the facts, circumstances, pleadings and laws involved . . . .” *Von Moltke v Gillies*, 332 US 708, 721; 68 S Ct 316; 92 L Ed 309 (1948). This includes pursuing “all leads relevant to the merits of the case.” *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). [*Grant*, *supra*, 470 Mich 485-487.]

That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant argues that trial counsel's decision could not have been sound trial strategy since he said he had only talked to “two or three” of the four witnesses and did not seek additional time to talk to the others. However, there was no clear error in the trial court's finding that the investigation was adequate. Counsel understood the gist of the defense and would not have learned anything more of significance if he had spoken to the additional one or two witnesses. Moreover, we cannot characterize the decision to forego the alibi defense to force the jury to focus on discrepancies in the prosecutor's case as an unsound trial strategy. The credibility of the alibi witnesses would likely have been called into question, and this may have overshadowed the credibility issues attendant to the victims' testimony and the inconsistencies between their testimony and the physical evidence. It is noteworthy that counsel employed the same strategy during an earlier trial that resulted in a hung jury. Moreover, counsel gained an

acquittal of the most serious charge – first-degree murder. Under the circumstances, we cannot conclude that the decision to forego the alibi defense was an unsound trial strategy.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Kurtis T. Wilder